# Playground design without all the lawsuits

*by James Leatzow*

Designing playground structures is like begging for a liability problem. Although most landscape architects and contractors have a good grasp of the potential for a major claim resulting from playground work, misunderstandings still exist. Work needs to be done to avoid major litigation concerning playground accidents.

One type of equipment landscapers use is "off-the-shelf" designs. These are sufficient for most playground work done by landscape contractors and architects. The landscaper simply has to specify which equipment would be appropriate. Unfortunately, liability exposure does not stop when the landscaper merely specifies equipment. Recommending equipment is still "professional" exposure (versus a general liability exposure) because it is based on a professional opinion.

Many issues need to be considered when involved with playground, athletic, park and even sports field design and maintenance.

## Deep pocket theory

The doctrine of joint and several liability (a real mouthful) is more commonly known as the "deep pocket theory." This doctrine essentially says that an injured person is entitled to recovery regardless of who is at fault. It is possible, therefore, for an injured person to collect from some design professional who may not have had much responsibility for the error that caused the injury, damage or death.

The public has complained most about the deep pocket theory because of what appears to be abuse in many cases. Landscape contractors and architects should investigate the status of joint and several liability in their own state so that they truly understand the potential for their exposures.

## Blaming the design

Most lawsuits involving playground situations will try to prove that a faulty design existed. Even if the design appears to be safe by common standards, after a person—usually a child—is injured, the injured party (plaintiff) will try to show that the design was in fact not safe. (How else could this person have been injured if it were truly safe?)

Once that injury occurs, the landscape architect/designer and manufacturer, as well as the contractor who physically built the playground, will inevitably be called into such a case. Under that scenario, the design professional will have to prove that everything done on that design fell within standards commonly accepted for this type of setting.

To defend himself, the manufacturer will have to show that the equipment design was safe. The landscape architect will have to prove that the same equipment has been used without problem in similar applications and is appropriate for the particular project. For example, you wouldn't place a 10-foot tall slide in a tot lot. The landscape contractor (as the installer) will have to show that the design and equipment were properly installed according to the design/plan and manufacturers' instructions.

## Equipment misuse

Children often get hurt by misusing equipment. If an adult gets hurt this way, the landscaper has an excellent chance of successfully defending the design. That defense is of diminishing value, however, with children. In my experience, most courts hold the injured child responsible for their own actions to a limited degree after about age 12. Any younger than that and you can usually count on the court finding the child not responsible for the use of such equipment.

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## Get it in writing

What does this mean to you? It means you have to "idiot-proof" your designs (the best you can) by figuring out how equipment might be misused by children. You should be careful in specifying any unusually tall equipment where the potential for a fall would enhance injury. If the client demands such items, then you should be considerably more specific in your written warnings. Write down why you, professionally, find it ill-advised to place such items in a park.

If a client still decides to go forward with an item against your recommendation, then it would be appropriate to have that client sign a statement. It should say that they understand that the decision is not according to your professional opinion of a safe play area. Documentation in all designs is the key to avoiding needless litigation.

If your client changes any aspect of the design, you need to confirm any and all changes in writing. You need not use an attorney for all mundane correspondence. A simple letter stating, "per your instructions, I have made the following changes...I shall assume this is your understanding of the changes as well, unless you notify me otherwise," will work.

## Equipment maintenance

The last area to cover is emerging as the newest and most likely target for playground safety litigation. That issue is maintenance.

You should be including statements and instructions for the future maintenance of any soft cushioning material, including replacement. You should also be including specific detail concerning maintenance on the equipment itself such as frequency of checking for missing nuts, bolts, sharp edges, protruding cement and general condition.

In these difficult times, it seems as though everyone is suing everyone for even the most minor situations. By careful thought, documentation, and a large dose of common sense, you can typically avoid being named in the absurd suits. And you will stand an excellent chance of successfully defending yourself in those actions with some merit, assuming you did not, in fact, err.

Good luck and don't get discouraged!

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